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November 10, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20024

VIA ELECTRONIC FILING
AND OVERNIGHT DELIVERY

Re: Finance Docket 34284, Southwest Gulf Railroad—Construction and Operation Exemption—Medina County, Texas

Dear Secretary Quinlan:

This letter will consolidate, restate, and supplement prior record statements by the Medina County Environmental Action Association (MCEAA) regarding the agency's analysis of biological resources under the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

I. INTRODUCTION

This letter has been prompted by the decision of consulting agency U.S. Fish and Wildlife Service (FWS) to adhere to its original arbitrary, capricious, and unlawful concurrence in an equally arbitrary, capricious, and unlawful Section of Environmental Analysis (SEA) finding of "no adverse effect" on listed threatened and endangered species. FWS, which had been reviewing its position, communicated its decision not to reconsider to MCEAA in a conference call on October 24, 2008, involving Adam Zerrenner (Field Supervisor for FWS Austin), Joy Nicholopolous (FWS Texas State Administrator), Alison Arnold (FWS Field Biologist), and undersigned counsel and counsel's law clerk.

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As a consequence, the legal defect in the agencies' "no adverse effect" finding remains substantially the same as the one MCEAA first objected to over four years ago.[1]

The agencies propose to let Vulcan [*hereinafter* including subsidiaries VCM and SGR] determine whether and when it will comply with the ESA for its proposed quarry and rail line project. Specifically, rather than determining whether species are present and how much of their habitat exists up front, as required by law, the agencies instead propose to let Vulcan divide its proposed quarry property into segments.[2]

Rather than requiring all of the surveying and mitigation up front, as required by law, the agencies instead propose to let Vulcan wait until just before it expands its quarry operations into a new segment of the property—and even then, FWS will not actually *require* surveys for those segments, but will merely hope that Vulcan sends them in time if it feels the need to apply for an incidental take permit.[3]

Rather than having a complete picture of what is present and how much mitigation (such as compensatory habitat acquisition) Vulcan should undertake, FWS will instead stand by passively while Vulcan's exploration, construction, and operations activities, to include the rail line, gradually degrade, encroach on, and ultimately clear and excavate the former habitat of species long since unlawfully "taken"[4] without any permit or compensatory mitigation

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1 DEIS p D-85 (Letter, TGLF to Victoria Rutson, SEA, Feb. 19, 2004, at 7) ("In the absence of focused counts [over the entire quarry property], FWS cannot guarantee that the applicant will not take a species during quarry excavation and operations, or during rail construction and operation")

2 SDEIS Fig. 3-7 (Showing Phase I Quarry Area, Rail Loading Area, and Plant Equipment Maintenance and Fuel Storage Area within boundary labeled "Vulcan's Biological Assessment Survey Area," the only portion of the quarry property where a biological assessment has been completed)

3 Section 10 of the ESA provides a mechanism for authorizing the take of endangered species by an individual, association, private landowner, corporation, or state or local governmental entity, provided the take is incidental to, and not the purpose of, an otherwise lawful activity. 16 U S C § 1539(a)(1)(B)

4 Section 9 of the ESA makes it a violation of the Act for anyone to "take" an endangered species "Threatened" species are also protected by this provision 50 C F R § 17 31(a) The term "take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U S C § 1532(19) The Secretary of the Interior defines "harass" and "harm" as follows

> Harass in the definition of "take" in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering
>
> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C F R § 17 3

As this letter will demonstrate, the agencies' foregoing approach underlying (and ultimately undermining) their "no adverse effect" finding is arbitrary, capricious, and unlawful.

If Vulcan's construction and operations destroy habitat without adequate mitigation and shift mobile species on to MCEAA members' land, MCEAA members will experience a real economic harm, in the form of increased restrictions on their land. This is the same harm that Camp Bullis has experienced closer to San Antonio, due to much the same failure by FWS of allowing segmented development to degrade and destroy habitat rather than requiring all of the mitigation up front.[5]

In addition MCEAA members have an aesthetic interest in the enjoyment of the native flora and fauna, particularly the birds, amphibians, and reptiles, that is part of their wider interest in preserving the working rural landscape of the historic and natural Quihi area MCEAA members desire that these species survive and recover and not be placed in jeopardy by the construction and operation of Vulcan's quarry and rail line. That cannot occur without full disclosure of the effects and thus an up front determination of the necessary mitigation. MCEAA's members and adjacent property owners do not intend to bear that obligation on Vulcan's behalf.

II. THE STB HAS FAILED TO COMPLETELY ASSESS EFFECTS

A The STB Has a Duty to Assess Effects on Species

Section 7 of the ESA requires that all federal agencies consult with FWS to ensure that the actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of any threatened or endangered species or adversely modify or destroy critical habitat of such species. 16 U S C § 1536(a)(2). As the federal action agency, STB bears the responsibility to determine whether any action it authorizes, funds, or carries out may affect a federally listed or proposed species.[6]

B Under the ESA the Action to be Analyzed Includes the Quarry and the Rail Line

The action here, as MCEAA has argued, is a single, connected action with both a rail and quarry component [7] SEA disagrees, at least under NEPA.[8] The issue under NEPA turns on whether the action for which agency approval is sought—the rail line—can

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[5] FWS is now engaged in covering itself for its past failures around Camp Bullis by stepping up enforcement for take, while doing absolutely nothing as the same harm is about to occur just to the west in Medina County. See http //www mysanantonio com/military/Another_project_near_Bullis_is_probed html (last visited Nov 9, 2008) It is even more appalling in this Vulcan case because FWS knows in advance the exact planning and future development for the 1,700 acres in question

[6] *E g City of Tacoma, Washington v F E R C*, 460 F 3d 53, 76 (D.C. Cir 2006) ("the ultimate responsibility for compliance with the ESA falls on the action agency")

[7] DEIS p D-83 to D-84, *see also e g*, DEIS p. D-90–D-109

[8] FEIS p 2-2 to 2-11, DEIS p 4-2 (defining proposed action as rail line and loading area at quarry)

reasonably be said to cause the related action(s), i.e., the quarry[9] It has been nearly ten years since the quarry was first proposed[10] and two years since the quarry received all necessary permits for operations,[11] yet Vulcan continues to wait on the rail license, making the causal relationship between the rail line and the quarry self-evident.

However, under the ESA, the test is not so limited. In accordance with the extensive protective purposes of Section 7 of the ESA, "[t]he term 'agency action' has been defined broadly"[12] Notably, the regulatory definition of agency "action" encompasses actions "authorized . . . in part" by federal agencies.[13] Therefore, despite SEA's objections under NEPA, it is proper under the ESA for the proposed action to be viewed as a whole with a quarry component and a federally licensed[14] rail component It is particularly proper given that the proposed rail line will solely serve the quarry, will be wholly controlled by the quarry owner (Vulcan),[15] and will serve no other purpose.

C. All Effects Must Be Analyzed, Including Those of the Quarry

However the scope of the "action" is defined, though, the scope of the effects analysis is the same· STB must account for the "total impact"[16] of the quarry and the rail line when determining whether this action may affect a federally listed or proposed species. A walk through the definition of "effect" in the regulations demonstrates this:

> Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process Indirect effects are those that are caused by the proposed action and are later in

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9 FEIS p 2-6

10 *See* DEIS p D-2 to D-5 (letter from MCEAA referencing Feb 2000 meeting with Vulcan and Feb 2000 email from TxDOT employee), Planning for the quarry began in 1999 *See e g*, DEIS p F-34

11 *See* SDEIS p C-37 (regarding settlement of state permitting issues)

12 *NRDC v Houston*, 146 F 3d 1118, 1125 (9th Cir 1998), *see also Pacific Rivers Council v Thomas*, 30 F 3d 1050, 1054 (9th Cir 1994) ("there is little doubt that Congress intended to enact a broad definition of agency action in the ESA")

13 50 C F R § 402 02 (defining "action")

14 *See also* 50 C F R. 402 02 (definition of action, subpart (c), includes "licensing") It is undisputed that the licensing of the rail line is an "action" being authorized" within the meaning of 16 U S C § 1536(a)(2)

15 See DEIS p B-3 (acknowledging common ownership).

16 *National Wildlife Federation v Coleman*, 529 F 2d 359, 373 (5th Cir 1976) ("the relevant consideration," in whether an agency has "adequately considered" the effects of an action under the ESA, "is the total impact")

> time, but still are reasonably certain to occur Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

50 C.F R. § 402.02 (definition of "effects") The proposed quarry, if not part of the action, is a "private actio[n] contemporaneous with the consultation in process." It is therefore part of the environmental baseline, because it is supposedly *certain to occur regardless of the rail line*. Indeed, it is this very assumption that underlies SEA's conclusion that the quarry does not require analysis as a connected action under NEPA [17]

Even if it the proposed quarry is not part of the environmental baseline—and it is hard to see how it would not be given the assumptions made by SEA under NEPA—it is related, as SEA admits [18] Therefore, the rail line is also an "interrelated action," part of a larger quarry-rail action that depends on the larger action for its justification. It is undisputed that there will be no rail line without the quarry, as there are no other shippers currently or foreseeably present in the area.

Under either scenario, whether part of the environmental baseline or as an interrelated action, the entire effect of the quarry—its construction, operations, and exploration activities—must be considered in making the "not likely to affect" determination, which it has not been to date [19]

In support of the facts and argument herein MCEAA submits the attached exhibits in **Tabs 1-17** and **Maps 1-2.**

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[17] FEIS p 2-7 ("According to SGR, if the proposed rail line were not built, the limestone produced by the proposed quarry would be transported by truck from the quarry to the UP rail line Thus, SEA viewed the use of truck transport as the No-Action Alternative in this case")

[18] DEIS p 4-4 ("the quarry and the rail line are related to the extent the rail line would serve the quarry")

[19] See 50 C F R § 402 12(a) ("A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary"),

50 C.F.R. § 402 13(a) ("If during informal consultation it is determined by the Federal agency, with the written concurrence of [FWS], that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary")

See also EI-1374 at 54-69 (MCEAA DEIS Comments, Jan 10, 2005)

III TO DATE, NUMEROUS SPECIES, HABITAT, AND EFFECTS ON SPECIES AND HABITAT HAVE NOT BEEN ANALYZED

A STB Determinations and FWS Concurrence to Date

To date STB has determined that construction and operation of any rail line alternative studied in the DEIS or SDEIS is not likely to affect any federally listed species or designated critical habitat [20] For the DEIS alternatives, FWS has concurred as to the golden cheeked warbler only [21] For the FEIS alternatives, FWS has concurred as to the golden-cheeked warbler (*Dendroica chrysoparia*), the black-capped vireo (*Vireo atricapillus*), Comal Springs Riffle Beetle (*Heterelmis comalensis*), Comal Springs Dryopid Beetle (*Stygoparnus comalensis*), Fountain Darter (*Etheostoma fonticola*), Peck's Cave Amphipod (*Stygobromus* (=*Stygonectes*) *pecki*), San Marcos Gambusia (*Gambusia georgi*), Texas Wild-Rice (*Zizania texana*), Texas Blind Salamander (*Typhlomoge rathbun*), and San Marcos Salamander (*Eurycea nana*), which were the species FWS identified as having potentially suitable habitat in the area of the SDEIS alternatives [22]

While specific unaccounted-for effects and impacts are discussed further in Part IV. *infra*, the record is clear that the "not likely to affect" determination relies on (1) the 2003 Biological Assessment (BA), which covered only "Phase 1" of the quarry site,[23] and (2) the "indication that [Vulcan] would continue to consult with [FWS] regarding impacts to federally listed species on the quarry site."[24] Reliance on either is improper.

B The Quarry Property Has Not Been Completely Surveyed For Species or Habitat

The 2003 BA purportedly surveyed, for the golden-cheeked warbler and black-capped vireo, only the southernmost portion of the quarry property, to include the Phase 1 quarry area, rail loading area, plant site, and plant equipment maintenance and fuel storage area.[25] These were the only surveys purportedly done in accordance with FWS

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20 SDEIS Appx B-2 p 64 (summarizing concurrences)

21 EI-1479 (Letter from Robert Pine, FWS, to Victoria Rutson, SEA, May 19, 2005)

22 SDEIS Appx B-2 p 65

23 DEIS p F-30 to F 62 A previous biological assessment was conducted for the same segment of the property in 2001, but it lacked required surveys of the golden-cheeked warbler and the black-capped vireo in accordance with FWS protocol. *See* DEIS p F-1 to F-30 (2001 BA) and Tab 1 (FWS survey protocols in effect as of July 9, 2004). Therefore, the 2003 BA, which incorporates the 2001 BA in full, is the relevant document

24 SDEIS p 3-38 (statement of no adverse effect for all listed and threatened endangered species) The statement of no adverse effect is also based on STB's analysis of effects along the proposed rail alternatives, but the chief defect here is the failure to view those effects in conjunction with more significant yet unanalyzed effects on the quarry property, including the Phase 1 area with the rail loading loop

25 SDEIS Fig 3-7, DEIS p F-43, F-45 and F-60

protocols, which is the only method accepted by FWS to establish the presence or absence of these two bird species [26]

On all other segments of the property, "screening" surveys were conducted for the birds [27] For all other species, including all terrestrial and all karst/cave species, no field surveys were conducted in the 2003 BA; the record does not reflect any additional surveying, including that alleged to have been done while "virtually all of the areas within the leased land boundaries were walked," beyond the screening surveys for the birds in Phases 2-5.[28] Further, the analysis of effects on terrestrial species was clearly based solely on a literature review and not on adequate field study [29] Many of the conclusory statements in the 2003 BA regarding the lack of potential species or habitat conflict with other, more recent portions of the record, as will be shown in Part III.D, *infra*

Instead, the 2003 BA proposes "broad scale low intensity surveys," apparently similar to the "screening" surveys, over the life of the project.[30] The species will be long gone by the time these surveys occur, because their habitat will have long since been degraded and harmed by the effects of the quarry and rail line

C The 2003 BA Analyzed Only the Effect of Habitat Clearing, For Only One Segment of the Quarry, and Arguably Only for One Listed Bird Species

The 2003 BA did not analyze the effect of encroaching construction, operations, and exploration, to include adverse "edge" effects that degrade habitat value for many hundreds of feet beyond the edge of development, land clearing, and mining. These effects, as documented in the record in this proceeding, are discussed further in Part IV, *infra*.

Rather, the 2003 BA makes conclusory statements for the black-capped vireo that it "seem[s] quite tolerant of military activities and vehicle movement" at Fort Hood, Texas, based on purported expert reports that are not in the record.[31]

The 2003 BA does not assess any effect besides direct habitat clearing on any species The effect of direct habitat clearing is discussed for the golden cheeked warbler

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26 Tab 1 at 3

27 DEIS p F-43 and F-45

28 *See* DEIS p F-37

29 *See* DEIS p F-50 to F-52

30 DEIS p F-38

31 DEIS p F-44 Notice to the contrary should be taken that the military has taken steps at Fort Hood to *reduce and eliminate* conflict between the black-capped vireo and training activities, if the consultant's conclusory statement were correct, there would have been no need to do so.
http //dodbiodiversity com/case_studies/ch_5_2 html (last visited Nov 9 2008) (By leveraging protection to rarely used habitat areas and by lifting restrictions in highly used areas, we were able to greatly reduce military training and endangered species protection conflicts ")

for Phase 1 of the quarry.[32] No other effect on any species is discussed because the 2003 BA concludes, without basis in most cases, that they are not likely to be present in Phase 1.[33] For the remainder of the property the 2003 BA offers conclusory statements that "Prior to any brush-clearing or earth disturbing activities, [FWS] sanctioned surveys would be completed and a full 'Biological Assessment' would be prepared,"[34] and "if nesting warblers, or other sensitive species, are identified mining activities can be modified to avoid disturbing those species."

Wholly absent from the 2003 BA is any discussion or analysis of the effects of quarry and rail line construction and operation (including edge effects), as well as quarry exploration activities, on the species and habitat in these later segments or phases of the quarry property. The 2003 BA promises more surveys prior to "brush-clearing or earth disturbing," i.e., prior to direct habitat destruction, but what about indirect or cumulative taking of habitat and species from noise, vibration, lighting, and other sources of potential effects? A discussion of those effects does not appear in the record. MCEAA has discussed the legal duty to analyze indirect effects of an action—which is the same as the duty to analyze the effects of an interrelated action or an action that is part of the environmental baseline—in previous correspondence and incorporates that argument here.[35]

D. The 2003 BA's Conclusory Statements Regarding the Likelihood of Species Presence and Habitat Are Contradicted by the Record

1. Karst, Cave, Aquifer, and Spring Species

The discussion of karst, cave, aquifer and spring species in the 2003 BA does not mention any such species by name. Rather, it layers conclusory statements to argue without basis that (1) there are no karst formations supporting cave or fissure habitat on the quarry property,[36] (2) there is no potential for impacts to such karst features known to exist on adjacent properties;[37] (3) "through extensive field observations and consultations with landowners, no sensitive recharge features have been identified in any of the five (5) Environmental Survey Areas or on any of the other parts of the 1,760 acre project site."[38]

The magnitude of the foregoing false statements in the 2003 BA and their conflict with the record is stunning. In its Water Pollution Abatement Plan (WPAP) submitted to the Texas Commission on Environmental Quality (TCEQ) in 2006, Vulcan identified no

32 DEIS p F-53 to F-54
33 DEIS p F-43 to F-44 and F-47 to F-52
34 DEIS p F-54
35 DEIS p D-203 to D-206 (Apr 19, 2004)
36 DEIS p F-47
37 DEIS p F-48
38 DEIS p F-49.

fewer than *seventeen* sensitive recharge features on the quarry property.[39] and literally dozens of karst caves and fissures, including two caves and nine solution cavities [40]

None of these karst or recharge features have been surveyed for listed threatened or endangered species, or for cultural resources for that matter [41] While the absence of a subsurface hydrologic connection—if truly absent, and not merely a result of intermittent drought—might be probative of the lack of presence of the spring and aquifer species, it says nothing about the unsurveyed karst and cave species.

The failure to survey for karst species is not just a problem on the surface. As the report of MCEAA's expert, Dr. Lynn Kitchen, notes:

> The document . . does not address the potential for subsurface features. No studies were conducted to determine if any caves, solution cavities, or karst features are found below the surface. These features could be easily compromised by blasting activities. Once blasting is completed, protection of undetected features may be difficult A sinkhole approximately 40 feet deep is located just west of the site. This sinkhole connects to a cave, the size of which is currently unknown. These types of subsurface features are relatively common in the quarry area and could be significant problems for the quarry and especially for protection of the aquifer. Vulcan should conduct subsurface investigations to ensure that large caves and other features are not present.[42]

Dr Kitchen's analysis does not reflect idle concerns. The entire quarry site lies over the Edwards Aquifer Recharge Zone,[43] and is riddled with faults and features that transmit to the subsurface in ways not yet fully analyzed.[44]

Though Vulcan proposes to "report any sensitive features discovered during mining," and promises that they will be "protected, rated, and dealt with as described in the Temporary Stormwater Section, Attachment D, herein," [45] the best management practices in Attachment D only purport to prevent sedimentation of such newly exposed

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[39] **Tab 2** at 2 (Site Geology Narrative), *see also* **Map 1** (Overall Site Plan of Entire Quarry)

[40] **Tab 2** at 5 (Site Geology Narrative); *see also* **Tab 3** (Geologic Assessment Tables and Comments) and **Map 1**

[41] EI-471 at 6 (Jan 10, 2004) (raising issue of cultural resources present in karst features).

[42] **Tab 4** at 1-2 (Letter, Dr Lynn Kitchen, Adams Environmental, to Richard Garcia, ICFQ, Aug 21, 2006).

[43] SDEIS Fig 3-3, *see also* **Map 1**

[44] **Map 1, Tab 2** at 8 (Site Geology Narrative) (noting faults as primary means of transmission to subsurface on the quarry property), *see also* **Tab 3** (Geologic Assessment Tables and Comments)

[45] **Tab 5** at Atch B (WPAP Recharge and Transition Zone Exception Form Attachment B)

features.[46] Perhaps this is because "*It is the intent of Vulcan to mine through such features, as stated elsewhere in this Water Pollution Abatement Plan.*"[47]

While the TCEQ might or might not ultimately sign off on such practices in a specific case as sufficiently protective of the aquifer's water quality, TCEQ is not responsible for assessing the impact on species.[48] There has been no provision for the karst and cave species on the quarry property in the analysis of effects or mitigation. Nor is it reasonable to expect quarry operators to be on the lookout for such miniscule life forms during mining and blasting, which is why an up front inventory of the sensitive features above and below the ground is needed, as part of a comprehensive look at effects on the quarry property that MCLAA has long requested.

As Dr. Kitchen explains:

> No environmental or geotechnical borings have been advanced [i.e. placed in the record] on the project site to identify and delineate potential sources of perched groundwater. Perched groundwater consists of confined subsurface water deposits that are located above the normal aquifer elevations. These groundwater sources are generally confined by an impermeable layer that prevents downward percolation and recharge to the aquifer. When quarried, the lateral confining layers may be breached, and the perched water table may drain into the excavated area. This may mobilize pollutants, and contribute to the overflow of the quarry's containment capacity. Local wells, especially those used for watering stock, may be using these groundwater sources and could be drained by construction of the quarry. These wells are often no more than 40 feet deep and may be susceptible to quarry activities. Periodic borings along a grid of the project area should be advanced to search for and delineate potential perched groundwater features.
>
> No surface or subsurface evaluations to screen for potential karst features have been conducted. Subgrade karst features are essential to transportation of groundwater to the aquifer. Without proper karst surveys, excavation and quarrying activities may disrupt groundwater flow and recharge into the aquifer. Additionally, karst features provide habitat for numerous threatened and endangered species, and disruption of these environments may adversely impact these species. At a minimum,

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[46] **Tab 6** (WPAP Temporary Stormwater Section Attachment D)

[47] **Tab 7** at p. 4 (WPAP Temporary Stormwater Section), *see also* **Tab 8** at p. 8 (approved WPAP acknowledging same), **Tab 9** at ¶ 5C (site investigation report acknowledging same)

[48] *Cf.* FEIS p. 5-101 (referring to TCEQ aquifer rules as suitable mitigation for impacts to karst features). Even this condition only covers the rail line, and does not provide any protection on the quarry property, which undermines the no effect determination. FEIS p. 5-104 ("SEA believes that requiring SGR to comply with the Texas Edwards Aquifer rules for the proposed rail line construction and operation is sufficient mitigation")

periodic borings along a grid of the project area should be advanced to search for and delineate potential karst features.[49]

The silence of the 2003 BA in the face of this evidence is enough to disqualify it as support for a reasoned "no adverse effect" determination for karst, cave, aquifer, and spring species. Further, FWS stated that the effect on eight listed threatened and endangered aquifer and spring species should be considered for the SDEIS alternatives.[50] These species were also purportedly analyzed in the 2003 BA, but their analysis was truncated by the aforementioned conclusory statement that recharge features were not present. SEA has recommended a mitigation condition for the rail alignments,[51] but has not factored that in to its endangered species determinations. SEA has also noted in the FEIS that there are karst features in the area near the loading track.[52]

2. Terrestrial Species

The SDEIS deems the Texas Tortoise and the Texas Horned Lizard to have a high potential to occur along all rail alignments.[53] Yet the 2003 BA, for similar if not identical habitat (including that of the rail loading loop), concludes they are unlikely to occur or that the habitat quality is marginal.[54] The 2003 BA also offers conclusory, vague statements about habitat quality.

The analysis for most species besides the golden-cheeked warbler and the black-capped vireo was based on a literature review and discussions with FWS staff, rather than field work.[55] Dr. Kitchen, MCEAA's expert, registered his objection to the conclusory nature of those findings,[56] which is reurged here particularly in light of the legal duty to consider the quarry's contribution to the total effect on each species.

E. The 2003 BA is Stale

The 2003 BA is also stale and outdated. It is not even clear if the same transects were walked in the years the studies were conducted.[57] The fact that adjacent landowners continued to report the presence of species on their land since its completion,[58] combined

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[49] **Tab 4** at 6 (Letter, Dr. Lynn Kitchen, Adams Environmental, to Richard Garcia, TCEQ, Aug. 21, 2006). It is possible that Vulcan already has some of this data from additional exploration it has since conducted on the property.

[50] EI-1987 (Apr. 12, 2006) SDEIS Appx. B-2 p. 65.

[51] SDEIS p. 3-34.

[52] FEIS p. 2-26.

[53] SDEIS p. 3-30.

[54] DEIS p. F-52.

[55] SDEIS p. 3-28.

[56] EI-1287 at 15 & 23 (Jan. 7, 2005); *see also* **Tab 10** (Letter, Dr. Lynn Kitchen, Adams Environmental, to Jana Milliken, FWS, Jan. 30, 2003) (criticizing habitat descriptions in 2003 BA as inadequate).

[57] **Tab 10** (Letter, Dr. Lynn Kitchen, Adams Environmental, to Jana Milliken, FWS, Jan. 30, 2003).

[58] EI-11978 (Sept. 11, 2008).

with the 2003 BA's unlawfully limited scope, renders it unable to support a finding of no effect on species or habitat Despite having nearly ten years to prepare an adequate biological assessment for its entire action, Vulcan has yet to do so.

MCEAA also notes that this staleness problem will persist How else will Vulcan know that its proposed on-site "buffer zone" mitigation is working without continuously surveying the segments of the property it has already mined through and disturbed, in addition to those it proposes to disturb? The answer is that the mitigation is not intended to work, because there is not intended to be any, because there won't be any species or quality habitat left by the time the surveys are conducted.

IV THE EFFECTS OF QUARRY AND RAIL OPERATIONS ARE LIKELY TO TAKE SPECIES AND HABITAT

For the additional reasons given below, the scope and inadequacy of the 2003 BA and the segmentation and deferral of further investigation on the quarry property do not constitute the required "hard look" at the effects of this action required by law.

A The Sources of Effects

The quarry consists of the areas to be mined by blasting and excavation; roads and conveyors connecting the mined areas to the plant area; a plant area consisting of unloading areas for massive dump trucks from the mined out areas, hoppers, conveyors, staging and stockpiling areas, screening and sorting machines, crushers, rinsing and wastewater treatment facilities, loading equipment, heavy duty diesel vehicles, generators, and rail cars.[59]

Construction of the rail line and the plant area of the quarry will require pile driving, as well as a "broad array of powered noise producing mechanical equipment," described in the SDEIS.[60] Construction of even the initial phase of the quarry implicates a wide array of activities, from clearing and grading, to crushing, to constructing runoff ponds, to erecting quarry plant equipment and constructing the rail line and roadways.[61] Additional details regarding the destruction were provided in response to questions from TCEQ, including, among other things, onsite burning of cleared vegetation.[62]

The quarry is authorized to operate around the clock with an hourly processing limit of 1500 tons of aggregate per hour and a separate annual processing limit of 8.5 million tons per year.[63] The quarry will have five rock crushers [64] Vulcan also plans nighttime rail operations.[65] All of these operations will require lighting.

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59 **Tabs 11** and **12** (Project Description), DEIS 4-102, **Map 2** (Site Plan for Plant Area)

60 SDEIS p. 4-17, **Tab 13** at 22

61 **Tab 13** at 9, **Tab 14** (WPAP Sequence of Major Activities)

62 **Tab 13**, *Id* at 47

63 **Tab 15**

B Documentation of Effects in the Record

In general, there has been no analysis of whether any vibration, noise, nighttime lighting, or other quarry or rail construction or operation activity, including edge effects, will "harm" and "harass," and thus "take," listed threatened and endangered species over the entire quarry property. There has been no such analysis even within the Phase 1 segment of the property, because the agencies have adopted the flawed 2003 BA. The environmental impact statements produced in this proceeding, and other studies, do not reflect that these effects will be confined to any one portion of the property or even within the boundaries of the property. MCEAA has raised this objection numerous times in the past.[66]

1. Noise

SEA characterized the existing noise environment as one where the primary sources of noise consisted of birds, insects and a few vehicles.[67]

However, the findings of SEA's own noise study, SDEIS ch. 4, indicate the potential for significant edge effects on species and habitat from encroaching construction, operations, and exploration.

Some of the edge effects from construction noise from the rail line on humans are documented in the DEIS and SDEIS, and exceed an adverse effect threshold of 80dBA[68] at ranges from 100 to 800 feet, depending on the construction activity.[69] There is no discussion of the impact of these factors on species or habitat, particularly with respect to the rail loading loop area.

Nor have the effects of noise from construction of the quarry on species been assessed, even though the extent of blasting is described as "very audible" to humans off-site.[70] Therefore the analysis of effects is incomplete. Vulcan says it does not even measure the effect of blast-related noise, and only sample operational data was provided for certain plant operations.[71] Yet even these non-blasting activities were found to cause effects outside of the quarry property boundary.[72]

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64 **Tab 16** at 3 (TCEQ response to air permit comments), **Map2.**

65 SDEIS p. ES-5

66 *E.g.*, DEIS p. D-17 (Letter, Dr. Lynn Kitchen to Victoria Rutson, SEA, Jun. 12, 2003) (requesting analysis of noise impacts on the black-capped vireo and golden-cheeked warbler and an inventory of karst features north of the loading loop), DEIS p. D-86 (Feb. 19, 2004), DEIS p. D-155 (Feb. 25, 2004), DEIS p. D-204 & D-206 (Apr. 19, 2004), EI-2708 at 14-15 (Jan. 10, 2007).

67 DEIS p. 3-43 & 3-47.

68 SDEIS p. 4-15 (describing the limit as one where "there may be adverse community reaction").

69 SDEIS p. 4-18 to 4-19, DEIS p. 4-75 & 4-77.

70 SDEIS p. 4-25.

71 SDEIS Appx. B-1 p. 219-220.

72 DEIS p. 4-112.

The SDEIS does a good job of discussing the operational noise impacts from the rail line outside of the quarry. However, the record's discussion of operational noise impacts from the quarry and rail loading loop is conclusory, e g.: "sound levels from quarry operations could impact adjacent residences. The noise impacts experienced by these residences would either be from the quarry or the rail line, but not from both "[73] The SDEIS also makes conclusory statements that rail loading activities on the quarry property "would be consistent with those generated by a quarry operation and would not result in off-site effects "[74] Setting aside the conclusory aspect, these statements (1) fail to address impacts to species and habitat and (2) also fail to adequately address synergistic effects associated with onsite and offsite impacts

These findings underscore the fallacy of allowing Vulcan to control the timing of its own ESA compliance How does Vulcan know when to start surveys as it encroaches on a new segment of the quarry property? When do the edge effects start to harm and harass the species and degrade the habitat? Where in the 2003 BA, the DEIS, SDEIS, FEIS or in any of the mitigation to date is any of this stated? It is not stated because Vulcan never intends to deal with it Once the agencies unlawfully delegate their authority to Vulcan and let it off the hook for the full scope of necessary mitigation up front, Vulcan has control of the process for the remainder of the life of the quarry.

2. Vibration

Pile driving for the rail line will cause subsurface vibration impacts to water wells beyond the quarry property boundary,[75] as well as sensitive structures.[76] While the fact that there will be blasting at the quarry was noted,[77] the effect of vibration on species or habitat on and off the quarry property was not analyzed The cumulative effects analysis for vibration, as MCEAA has noted previously, consists of a conclusory statement that vibration would not propagate outside the property boundary, regardless of whether it was caused by construction, pile driving, blasting, or general operation [78] That says nothing about what will happen within the property boundary or along the edges of habitat Vulcan is supposedly preserving or has not yet surveyed. Yet that is precisely how the habitat destruction will occur.

3. The Effect of Lighting and Onsite Burning of Vegetation on Species and Habitat Were Not Analyzed

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73 DEIS p. 4-112, *see also* SDEIS at 4-25
74 SDEIS p. 4-20
75 FEIS p. 2-29 and 4-15 to 4-16, SDEIS p 4-26
76 DEIS p 4-85
77 SDEIS Appx B-1 p 216-217, SDEIS p 4-24
78 SDEIS p 4-26, EI-2708 at 14-15 (Jan 10, 2007)

4 Conclusory Disposition of Construction Impacts

The DEIS claims there were "no occurrences of threatened or endangered animal species in the project area, and no known karst features (caves, caverns), which can harbor endangered species or insects. Nevertheless, it is possible that construction would disturb some endangered, threatened, or rare species."[79]

There are several problems with that statement. First, its conception of the "project area," when read in context with the surrounding passages and proposed mitigation is plainly limited to the rail line. Therefore, it demonstrates a failure to analyze the entire "action area" within the meaning of the ESA regulations that is necessary to support a finding of no effect.[80] Second, the statement that there are no known karst features is false for the reasons shown in the attached exhibit Tabs and Maps and Part III.D.1, *supra* Third, FWS has admitted that adjacent landowners have sighted the golden-cheeked warbler on their property, so there have been occurrences of endangered species in the project area.[81] Fourth, Vulcan plans to mine through and destroy karst features on the quarry property,[82] so even with a mitigation condition obligating Vulcan to investigate any karst features it discovers when constructing the rail line, there is still no protection for such features on the quarry property, a highly relevant and unconsidered factor that undermines the no effect determination Fifth, the admission that construction may disturb species also directly undermines the no effect determination.

C Rebuttal to Other Arguments

FWS and Vulcan advance three sets of justifications for their segmented approach. First, they claim that buffering and clearing out of season will protect the bird species from take That is completely speculative and unsupported by the record FWS and Vulcan have no idea what extent of buffering is necessary to protect the species and their habitat from edge effects of encroaching construction and operations, or even whether the species will be able to use the degraded buffer areas that remain, surrounded by quarry operations. Avoidance strategies have not even been analyzed for most effects because the effects analysis was never completed for species and habitat on the entire quarry property. Therefore it is speculative, on this record, to assume that a given method of avoiding or lessening an effect will be sufficient to protect a species or its habitat from take.

Second, FWS and Vulcan rest on the idea of continued surveys over the life of the project, at times chosen by Vulcan. That unlawfully permits Vulcan to ignore edge

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79 DEIS p 4-42 to 4-43.

80 50 C F R § 402 02 (Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action") This failure is essentially the same as the failure to analyze the proper scope of effects noted above

81 EI-11978 (Sept 11, 2008)

82 **Tab 7** at 4 (WPAP Temporary Stormwater Section), *see also* **Tab 8** at 8 (approved WPAP acknowledging same). **Tab 9** at ¶ 5C (site investigation report acknowledging same)

effects and survey after the habitat has been degraded and the species driven away or killed. There is no mechanism to trigger a survey requirement in the record.

Finally, FWS presents its red herring.

> If [FWS] were to require that Vulcan conduct three years of presence/absence bird surveys over its entire property up front, Vulcan may be inclined to immediately bulldoze all areas where no endangered species were recorded, and to maintain those areas in a barren condition to avoid having to conduct additional surveys on those areas in the future [83]

At least in that scenario, Vulcan would have to fully disclose and mitigate for the entire quarry property, which is more than the present passivity of FWS will require. Under FWS's present position, Vulcan will not only be able to take species and habitat over time, at its own pace, without consequence, but it will also get the benefit of shifting its mitigation costs to its neighbors—adjacent landowners and MCEAA members who will see species driven onto their property with corresponding land use restrictions.

[83] DEIS p B-23

V. CONCLUSION

The STB, as the agency ultimately responsible for ESA compliance and the record support for the "not likely to adversely affect" determination, has a duty to correct the deficiencies in its existing no effect determination and should do so.

Reliance on the FWS concurrence is ill-advised. FWS is telling the residents of the action area that it can't do the job it is paid to do and require Vulcan to fully assess the effect on species and habitat up front, even though Vulcan has had nearly ten years[84] to do so. If it does, FWS is saying, then Vulcan might really harm the species and habitat (despite at least having to fully mitigate for whatever it destroys in that scenario), so instead, MCEAA members and adjacent landowners should just roll over, allow the species and habitat on the quarry property to be destroyed gradually over time, without adequate mitigation by Vulcan, and accept a servitude on their own land in gratitude That is the attitude of an agency that does not know how to stand up to a bully. That is an attitude of cowardice. That is the attitude of an agency that has gotten used to losing.[85]

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation

/s/

David F. Barton

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[84] *See* DEIS p D-2 to D-5 (letter from MCEAA referencing Feb. 2000 meeting with Vulcan and Feb 2000 email from TxDOT employee). Planning for the quarry began in 1999 *See e.g.*, DEIS p F-34

[85] Chris Bowman, *Analysis Bush Team Battered by Courts on Environment*, SACRAMENTO BEE, May 19, 2008 ("Of 78 federal court rulings and settlements in species cases resolved since January 2001, the Bush administration won just one"), *available at* http://www.sacbee.com/111/story/948788.html (last visited Nov. 10, 2008)

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Certificate of Service

I hereby certify that the foregoing has been served on all Parties of Record in *Finance Docket Number 34284*, by first class mail or more expeditious means, on this 10th day of November, 2008, including:

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